

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 10, 2021

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

WILDEARTH GUARDIANS;
WESTERN WATERSHEDS
PROJECT; and KETTLE RANGE
CONSERVATION GROUP,

Plaintiffs,

v.

US FOREST SERVICE; GLENN
CASAMASSA, Pacific Northwest
Regional Forester; and RODNEY
SMOLDON, Forest Supervisor,

Defendants

and

DIAMOND M RANCH, a
Washington General Partnership,

Defendant-Intervenor.

NO: 2:20-CV-223-RMP

ORDER DENYING PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
FEDERAL DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT

BEFORE THE COURT is Plaintiffs' Motion for Summary Judgment, ECF
No. 29; Plaintiffs' Motion to Consider Extra-Record Evidence in Support of
Plaintiffs' Motion for Summary Judgment, ECF No. 34; Defendants' Cross-Motion
ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
AND GRANTING FEDERAL DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT ~ 1

1 for Summary Judgment, ECF No. 37; and Plaintiffs’ Motion to Strike Federal
2 Defendants’ and Defendant-Intervenor’s Extra-Record Declarations and Exhibits,
3 ECF No. 46.

4 Plaintiffs Wildearth Guardians, Western Watersheds Project, and Kettle
5 Range Conservation Group (collectively “Plaintiffs”) allege that Defendants
6 United States Forest Service (the “Forest Service”), Glen Casamassa, and Rodney
7 Smoldon (collectively “Federal Defendants”) failed to adequately assess the
8 impacts to gray wolves of federally permitted livestock grazing in the Colville
9 National Forest in violation of the National Environmental Policy Act (“NEPA”)
10 and National Forest Management Act (“NFMA”). *See* ECF No. 1. Plaintiffs
11 further allege that Federal Defendants failed to consult with the United States Fish
12 and Wildlife Service (“USFWS”) over the potential impacts of livestock grazing to
13 endangered species under the Endangered Species Act (“ESA”). *See id.*

14 The Court heard oral argument via video conference. Jennifer Schwartz
15 argued on behalf of Plaintiffs. The Federal Defendants were represented by Emma
16 Hamilton, Shawn Pettigrew, and Michelle Spatz. Chris Montgomery appeared on
17 behalf of Defendant-Intervenor Diamond M. Ranch. The Court has reviewed the
18 motions, the record, heard oral argument, and is fully informed.

19 For the reasons discussed *infra*, the Court finds that Plaintiffs have not shown
20 the requisite standing for their claims under the National Environmental Policy Act
21 and National Forest Management Act because the asserted injury is not redressable

1 by the Court as the Washington Department of Fish and Wildlife is the lead agency
2 primarily responsible for wolf management operations including the lethal removal
3 of gray wolves.

4 Plaintiffs also cannot show any injury from the revised 2019 Forest Plan
5 absent a site-specific injury causally related to an alleged defect in the 2019 Forest
6 Plan. The Court further finds that Plaintiffs' NFMA challenges to the 2019 Forest
7 Plan are not ripe for adjudication because the Forest Plan neither authorizes
8 livestock grazing nor wolf depredations.

9 Finally, the Court finds that the Forest Service did not violate Section 7 of the
10 Endangered Species Act by not consulting with the U.S. Fish and Wildlife Service
11 (USFWS) over the effects of cattle grazing to the whitepark pine, Canada lynx, or
12 grizzly bear where the Forest Service satisfied its consultation obligations or
13 consultation was not required by reason of the species either being only a
14 "candidate" for federal listing or not present in the allotments.

15 Accordingly, the Court enters summary judgment in favor of the Federal
16 Defendants.

17 **BACKGROUND**

18 **Gray Wolves in Washington State**

19 Gray wolves were classified as an endangered species in Washington State
20 under the provisions of the ESA in 1973. DM03376. In 2011, wolves in the eastern
21 third of Washington were removed from federal protections under the ESA. *Id.* As

1 of January 4, 2021, the gray wolf was removed from the Federal list of Endangered
2 and Threatened Wildlife. 85 Fed. Reg. 69778 (Nov. 3, 2020) (Final Rule). The gray
3 wolf remains a state-listed endangered species in Washington and is designated as a
4 “sensitive species” in the Pacific Northwest region. FP108617.

5 The Washington Department of Fish and Wildlife (“WDFW”) is the primary
6 agency responsible for managing wolves in the Eastern Washington recovery area
7 guided by the Wolf Conservation and Management Plan. FP015348–015647.

8 “One goal of the Wolf Conservation and Management Plan for Washington
9 (Plan) is to manage wolf-livestock conflicts in a way that minimizes livestock losses
10 while at the same time not impacting the recovery and long-term perpetuation of a
11 sustainable wolf population.” DM03391. “The WDFW and livestock producers can
12 implement non-lethal and preventative control measures any time they deem
13 necessary throughout Washington.” *Id.* “The WDFW has full management
14 authority of wolves in the Eastern Washington recovery area . . . and under state law
15 RCW 77.12.240, can implement lethal measures to control depredating wolves when
16 it is deemed necessary to detour chronic livestock depredations.” *Id.*; FP015435
17 (“Wherever wolves are federally listed in Washington, the U.S. Fish and Wildlife
18 Service and USDA Wildlife Services are the lead agencies to respond to reports of
19 wolf depredations.”).

20 Pursuant to the Wolf Conservation and Management Plan, “[l]ethal removal
21 may be used to stop repeated depredation if it is documented that livestock have

1 clearly been killed by wolves, non-lethal methods have been tried but failed to
2 resolve the conflict, depredations are likely to continue, and there is no evidence of
3 intentional feeding or unnatural attraction of wolves by the livestock owner.”
4 FP015438.

5 Since 2012, WDFW has lethally removed 34 wolves from 10 packs in
6 response to wolf-livestock conflicts. ECF No. 29 at 17; *see* AR01824 (“WDFW
7 documented 21 wolf mortalities in 2019; nine were removed by the department in
8 response to wolf-caused livestock deaths and injuries . . . [and] two wolves [were]
9 killed by landowners protecting livestock (caught in the act)”). As of December 31,
10 2019, WDFW counted 108 wolves 21 packs, in addition to 37 wolves in five packs
11 counted by the Confederated Tribes of the Colville Reservation. AR01823–01824.
12 In 2019, the “state’s minimum year-end wolf population increased by 11 percent and
13 mark[ed] the 11th consecutive year of population growth.” *Id.*

14 **Grazing in the Colville National Forest**

15 The Colville National Forest encompasses about 1.1 million acres in
16 Washington State. FP014458. “The Multiple Use Sustained Yield-Act of 1960
17 mandates that national forests are administered for a variety of uses including
18 livestock grazing.” FP014485.

19 “Livestock grazing on the Colville National Forest is an important use to the
20 local ranching industry and local communities.” FP108812. The majority of
21 permitted grazing is for cattle with only one sheep allotment (currently vacant)

1 remaining. *Id.* Grazing allotments on the Forest cover about 745,000 acres of
2 administered forest lands. FP108811. There are 58 grazing allotments where 42
3 currently have permitted use and 16 are in a vacant status. FP108813.

4 The Forest Service manages livestock grazing on the national forests by using
5 three separate decisionmaking processes: (1) federally issued grazing permits; (2)
6 allotment management plans (“AMPs”); and (3) annual operating instructions
7 (“AOIs”). ECF No. 1 at 15 (citing *Or. Natural Desert Ass’n v. U.S. Forest Serv.*,
8 465 F.3d 977, 979 (9th Cir. 2006)) (“*ONDA*”).

9 A grazing permit is a “document authorizing livestock to use National Forest
10 System or other lands under Forest Service control for the purpose of livestock
11 production.” *ONDA*, 465 F.3d at 979–80 (citing 36 C.F.R. § 222.1(b)(5); 43 U.S.C.
12 § 1702(p)). “A permit grants a license to graze and establishes: (1) the number, (2)
13 kind, (3) and class of livestock, (4) the allotment to be grazed, and (5) the period of
14 use.” *Id.* at 980 (citing 36 C.F.R. §§ 222.1–222.4; 43 U.S.C. § 1752). The Forest
15 Service generally issues ten-year term permits. *Id.* (citing 36 C.F.R. § 222.3(c)(1)).

16 “While a forest plan is an overarching land management directive for an entire
17 forest-wide unit within the National Forest System, the AMP is a land management
18 directive for a specific allotment within a national forest that the Forest Service has
19 designated for livestock grazing.” *ONDA*, 465 F.3d at 980 (citing *Wilderness Soc’y*
20 *v. Thomas*, 188 F.3d 1130, 1133 (9th Cir. 1999).) In other words, AMPs are “site-
21 specific” prescribing the manner in, and extent to which, grazing operations on a

1 particular allotment will be conducted in order to meet multiple-use objectives. *Or.*
2 *Nat. Desert Ass’n v. U.S. Forest Serv.*, 312 F. Supp. 2d 1337, 1340 (D. Or. 2004).
3 The AMP must be consistent with the applicable forest plan. *ONDA*, 465 F.3d at
4 980 (citing 16 U.S.C. § 1604(i); *Neighbors of Cuddy Mountain v. Alexander*, 303
5 F.3d 1059, 1062 (9th Cir. 2002)); *see also* FP014485 (“Allotment management plans
6 provide site-specific details for management of the resource and identify mitigation
7 measures needed to reduce identified impacts in order to meet or move toward
8 management objectives.”).

9 The Forest Service also typically issues yearly instructions to grazing
10 permittees through annual operating instructions. Generally, the AOI annually
11 conveys long-term directives into instructions to the permittees for annual
12 operations. *Id.* “Because an AOI is issued annually, it is responsive to conditions
13 that the Forest Service could not or may not have anticipated and planned for in the
14 AMP or grazing permit, such as . . . [the] degree of risk to threatened or endangered
15 species affected by grazing.” *Id.* at 980–81 (9th Cir. 2006).

16 Here, however, the Forest Service maintains that it does not issue AOIs in
17 implementing its grazing program. ECF No. 37 at 54. Rather, for the 2020 grazing
18 season, the Forest Service “prepared notes for the permittee identifying the number
19 of livestock to be grazed on the allotments covered by the 2013 Permit that season
20 and outlining various guidelines, reporting requirements, and other matters.” *Id.*
21 (citing AR01412–1414).

Grazing by Defendant-Intervenor Diamond M Ranch

In 2013, the Forest Service issued Diamond M Ranch a ten-year term permit allowing 736 cow/calf pairs to graze from summer to mid-autumn on the Churchill, Lambert, C.C. Mountain, Hope Mountain, and Copper-Mires allotments under the then-governing 1988 Forest Plan. DM03397–3409. The 2013 Permit incorporates the AMPs for the Churchill, Lambert, CC Mountain, Hope Mountain, and Copper-Mires allotments. DM03404. Plaintiffs assert that “[o]f WDFW’s 34 lethal control actions, over 90% were either completely or partially in response to predations of federally permitted cattle grazing on the Colville National Forest, with 30 wolves (88%) being killed largely at the behest of Diamond M.” ECF No. 29 at 17.

Revising the Colville Forest Plan

In 2011, the Forest Service publicly released its “Proposed Action” for revising the existing land management plan for the Colville National Forest completed in 1988. FP014443. “Plans are strategic in nature, making general decisions that are often referred to as programmatic decisions.” FP014449.

The “Proposed Action” noted that “[w]olves have been documented in the planning area, including den and rendezvous sites with wolf pups” and “[t]he revised forest plan needs to address how these sites would be protected.” FP014478. The “Proposed Action” further noted with respect to grazing that “[a]llotment management plans will continue to be developed to design specific criteria for management of the livestock.” FP014486.

1 The Draft Programmatic Environmental Impact Statement (EIS), published in
2 January of 2016, “documents the analysis of six alternatives . . . developed by the
3 Forest Service for the programmatic management of approximately 1.1 million acres
4 administered by the Colville National Forest.” FP086935.

5 The draft EIS used the surrogate species approach to evaluate species and
6 ecosystem viability. FP086943. “The surrogate species assessment process was
7 completed for the planning area in order to determine the baseline conditions for
8 each of the surrogate species . . . and to identify risk factors that influence the
9 viability of surrogate wildlife species.” FP086949. The gray wolf is listed as a
10 Region 6 sensitive species and grouped as a “habitat generalist.” The gray wolf’s
11 “surrogate species” is the wolverine. FP086945.

12 The Forest Service prepared a Biological Assessment for the Colville National
13 Forest Land and Resource Management Revision dated March 28, 2017, assessing
14 the effects implementing the management activities proposed in the revised Forest
15 Plan. FP098490. “The determinations of these assessments are that implementation
16 of the revised Plan may affect, likely to adversely affect grizzly bear, Canada lynx,
17 woodland caribou, wolverine, whitebark pine, and bull trout.” FP098753. The
18 Forest Service requested formal consultation with the United States Fish and
19 Wildlife Service (USFWS) on the action’s effect to these species pursuant to Section
20 7 of the ESA. *Id.*; *see also* FP100513–101045 (Biological Opinion issued by
21

1 USFWS); *see also* AR 102021–102039 (memorandum re: “Status of Gray Wolf in
2 the State and Planning Area” dated January 4, 2018 by Forest Service).

3 The final EIS (FEIS) for the revised Forest Plan and draft Record of
4 Decision (ROD) were released for public comment in September 2018.
5 FP108129–109666. Relying upon the FEIS, as well as the Biological Opinion
6 issued by the USFWS, the Forest Service adopted the 2019 Forest Plan through an
7 October 2019 Record of Decision (ROD). FP113623–113685; FP109667–110168
8 (Colville National Forest Land Management Plan).

9 Plaintiffs filed suit asserting the following claims: (1) the Forest Service
10 failed to address impact to wolves and failed to evaluate reasonable grazing
11 management alternatives that reduce wolf-livestock conflicts in violation NEPA;
12 (2) the Forest Service failed to complete supplemental NEPA analysis for the
13 Diamond M Ranch AMPs; (3) the 2019 revised Colville Forest Plan fails to meet
14 NFMA’s requirements; (4) the Forest Service’s 2020 grazing authorizations for the
15 Diamond M allotments are inconsistent with the 2019 revised Colville Forest Plan
16 in violation of NFMA; and (5) the Forest Service failed to consult USFWS as
17 required by ESA to determine whether annual grazing “may affect” listed,
18 proposed and/or candidate species such as Canada lynx, grizzly bear, and
19 whitebark pine that may be present in the action area. *See* ECF No. 1.

20 Plaintiffs seek declaratory relief holding that the FEIS/ROD and revised
21 Colville Forest Plan violated NEPA and/or NFMA and thus are arbitrary,

1 capricious, and an abuse of discretion, contrary to law, and/or issued without
2 observance of procedure required by law under the judicial review standards of the
3 Administrative Procedure Act (APA), 5 U.S.C. § 706(2). ECF No. 1 at 56–57.

4 **LEGAL STANDARDS**

5 The parties have filed cross-motions for summary judgment under Fed. R.
6 Civ. P. 56. A court may grant summary judgment where “there is no genuine
7 dispute as to any material fact” of a party's prima facie case, and the moving party
8 is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *see also Celotex*
9 *Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). Courts may resolve APA
10 challenges via summary judgment. *See, e.g., Klamath Siskiyou Wildlands Ctr. v.*
11 *Gerritsma*, 962 F.Supp.2d 1230, 1233 (D. Or. 2013) (“‘Summary judgment’ is
12 simply a convenient label to trigger this court’s review of the agency action.”).

13 Under the APA, a court may set aside a final agency action only if it is
14 “arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with
15 the law.” 5 U.S.C. § 706(2)(A). “Normally, an agency rule would be arbitrary and
16 capricious if the agency has relied on factors which Congress has not intended it to
17 consider, entirely failed to consider an important aspect of the problem, offered an
18 explanation for its decision that runs counter to the evidence before the agency, or
19 is so implausible that it could not be ascribed to a difference in view or the product
20 of agency expertise.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mutual Auto Ins.*
21 *Co.*, 463 U.S. 29, 43 (1983).

1 “The APA does not allow the court to overturn an agency decision because it
2 disagrees with the decision or with the agency's conclusions about environmental
3 impacts.” *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir.
4 2010) (citations omitted). The arbitrary and capricious standard is deferential and
5 the court “may not substitute its judgment for that of the agency concerning the
6 wisdom or prudence of [the agency’s] action.” *Id.* (quoting *Or. Env’t Council v.*
7 *Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)). However, post-hoc rationalizations
8 cannot support the agencies’ action. *See High Country Conservation Advoc. v.*
9 *U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1192 (D. Colo. 2014) (“Any post-hoc
10 rationalizations provided by the agencies in this litigation are irrelevant to the
11 question of whether the agencies complied with NEPA at the time they made their
12 respective decisions.”).

13 **National Environmental Policy Act (NEPA)**

14 “Approval of a resource management plan is considered a major Federal
15 action significantly affecting the quality of the human environment.” 43 C.F.R.
16 § 1601.0–6. “NEPA is a procedural statute that requires the federal government to
17 carefully consider the impacts of and alternatives to major environmental
18 decisions.” *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1110
19 (9th Cir. 2018) (quoting *Native Ecosystems Council v. Weldon*, 697 F.3d 1043,
20 1051 (9th Cir. 2012)). NEPA’s procedural requirements serve two “twin aims”:
21 (1) “it places upon [a federal] agency the obligation to consider every significant

1 aspect of the environmental impact of a proposed action” and (2) “it ensures that
2 the agency will inform the public that it has indeed considered environmental
3 concerns in its decisionmaking process.” *Id.* (quoting *Kern v. U.S. Bureau of Land*
4 *Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002)).

5 **National Forest Management Act**

6 “The NFMA sets forth the statutory framework and specifies the procedural
7 and substantive requirements under which the Forest Service is to manage National
8 Forest System lands.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932
9 (9th Cir. 2010) (citation omitted). “Procedurally, ‘all management activities
10 undertaken by the Forest Service must comply with the forest plan, which in turn
11 must comply with the [NFMA].’” *Id.* (citing *Idaho Sporting Cong., Inc. v.*
12 *Rittenhouse*, 305 F.3d 957, 962 (9th Cir. 2002)). “Substantively, the NFMA also
13 places a duty on the Forest Service to ‘provide for diversity of plant and animal
14 communities based on the suitability and capability of the specific land area’”
15 *Id.* (citing 16 U.S.C. § 1604(g)(3)(B)). “In order to ensure compliance with the
16 forest plan and the [NFMA], the Forest Service must conduct an analysis of each
17 ‘site specific’ action, such as [grazing], to ensure that the action is consistent with
18 the forest plan.” *Id.* (quoting *Idaho Sporting Cong., Inc.*, 305 F.3d at 962).

19 **DISCUSSION**

20 **I. Standing**

1 As a threshold issue, the Federal Defendants contest Plaintiffs’ Article III
2 standing for their NEPA and NFMA claims on the basis that Plaintiffs have failed
3 to prove causation and redressability. ECF No. 37 at 24–29. The Federal
4 Defendants further maintain that “Plaintiffs have not demonstrated standing to
5 challenge the 2019 Forest Plan revision because the 2019 Plan does not
6 contemplate wolf removal actions or authorize grazing, and the only project-level
7 grazing authorization Plaintiffs challenge is the 2013 Permit, which is governed by
8 the 1988 Forest Plan.” ECF No. 37 at 29.

9 **A. Motion to Strike Federal Defendants’ and Defendant Intervenor’s**
10 **Extra-Record Declarations and Exhibits**

11 Before resolving the issue of whether Plaintiffs’ have standing to bring their
12 NEPA and NFMA claims, the Court must first address whether it may consider
13 extra-record declarations and exhibits submitted by the Federal Defendants is
14 appropriate. Plaintiffs move to strike as improper extra-record evidence (1)
15 Diamond M Partnership’s Declaration, ECF No. 35-1; (2) Jeffery D. Flood’s
16 Declaration, ECF No. 35-2; and (3) Roberto M. Garcia’s Declaration and Exhibit
17 A, the current version of the WDFW’s “Wolf-Livestock Interaction Protocol” (the
18 “Protocol”), ECF No. 37-1. The Federal Defendants assert that this extra-record
19 evidence may be properly introduced for the sole purpose of rebutting Plaintiffs’
20 standing. *See* ECF No. 48 at 2, 5.

1 “The party who seeks to invoke federal jurisdiction has the burden of
2 establishing that it has suffered an injury in fact, ‘an invasion of a legally-protected
3 interest’ that is concrete and particularized, and actual or imminent, not conjectural
4 or hypothetical.” *Didrickson v. United States Dep’t of Interior*, 982 F.2d 1332,
5 1340 (9th Cir. 1992) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560
6 (1992)). Accordingly, plaintiffs may submit declarations for the purpose of
7 establishing standing. *Friends of Rapid River v. Probert*, 427 F. Supp. 3d 1239,
8 1263 (D. Idaho 2019) (citing *Nw. Env’t. Def. Ctr. v. Bonneville Power Admin.*, 117
9 F.3d 1520, 1527–28 (9th Cir. 1997)) (the court may “consider the affidavits not in
10 order to supplement the administrative record on the merits, but rather to determine
11 whether petitioners can satisfy a prerequisite to this court’s jurisdiction.”) (citing
12 *Didrickson*, 982 F.2d at 1340).

13 The authorities cited by the Federal Defendants establish that a plaintiff may
14 cite extra-record evidence for the limited purpose of establishing standing. *Sierra*
15 *Club v. U.S. E.P.A.*, 762 F.3d 971, 976 n. 4 (9th Cir. 2014) (allowing petitioners
16 leave to submit declarations to establish standing for purposes of appeal);
17 *Didrickson*, 982 F.2d at 1340 (accepting appellant-intervenors’ supplemental
18 declarations alleging particularized injury because intervenors were not required to
19 establish standing until they appealed); *Gallatin Wildlife Assoc. v. U.S. Forest*
20 *Serv.*, CV-15-27-BU-BMM, 2016 WL 6684197, at *2 (D. Montana Apr. 7, 2016)
21 (“The Court shall not admit the Bailey Declaration beyond the purpose of helping

1 Plaintiffs establish the irreparable harm element of standing.”); *Cent. Sierra Env’t*
2 *Res. Ctr. v. U.S. Forest Serv.*, 916 F. Supp. 2d 1078, 1086 (E.D. Cal. 2013) (“In an
3 action under the APA, the court generally may review only the administrative
4 record, 5 U.S.C. § 706(2)(F), but it may consider extra-record evidence that allows
5 plaintiffs to establish standing.”).

6 The authorities cited by the Federal Defendants do not expressly stand for
7 the proposition that a defendant may introduce extra-record evidence to rebut a
8 plaintiff’s standing. Accordingly, Plaintiffs’ Motion to Strike, ECF No. 46, is
9 granted and the Court will not consider the extra-record declarations and exhibits
10 proffered by the Defendants in considering whether Plaintiffs have standing for
11 their NEPA and NFMA claims.

12 **B. Plaintiffs’ Standing**

13 As noted above, the Federal Defendants argue that Plaintiffs do not have
14 standing to bring their NEPA and NFMA claims. ECF No. 37 at 24–29. Plaintiffs
15 assert that the alleged NEPA, NFMA, and ESA violations “cause direct injury to
16 the aesthetic, conservation, recreational, scientific, educational, inspirational, and
17 wildlife preservation interests of Plaintiffs and their members, supporters, and
18 staff.” ECF No. 1 at 10; *see also* ECF No. 20-15 (Declaration of Jocelyn Leroux,
19 Western Watersheds Project, Washington and Montana Director); ECF No. 20-16
20 (Declaration of Timothy Coleman, Executive Director for Kettle Ranger
21 Conservation Group).

1 “To establish standing, a plaintiff must show that (1) he or she has suffered
2 an injury in fact that is concrete and particularized, and actual or imminent; (2) the
3 injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be
4 redressed by a favorable court decision.” *Wildearth Guardians v. U.S. Dep’t of*
5 *Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015). “[A] plaintiff bringing suit under the
6 Administrative Procedure Act for a violation of NEPA must show that his alleged
7 injury falls within the ‘zone of interests’ that NEPA was designed to protect.”
8 *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001).

9 An association has standing “to bring suit on behalf of its members when its
10 members would otherwise have standing to sue in their own right, the interests at
11 stake are germane to the organization's purpose, and neither the claim asserted nor
12 the relief requested requires the participation of individual members in the
13 lawsuit.” *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S.
14 167, 181 (2000). There is no dispute that Plaintiffs’ members’ interests in
15 recreational and aesthetic enjoyment of gray wolves is related to Plaintiffs’
16 respective organizational purposes.

17 To show a cognizable injury in fact, plaintiff must show that (1) the agency
18 violated certain procedural rules; (2) these rules protect plaintiff’s concrete
19 interests; and (3) it is reasonably probable that the challenged action will threaten
20 plaintiff’s concrete interests. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*,
21 341 F.3d 961, 969–970 (9th Cir. 2003). “[A] procedural injury is complete after a

1 [land resource management plan] has been adopted, so long as it is fairly traceable
2 to some action that will affect the plaintiff's interests." *Sierra Forest Legacy v.*
3 *Sherman*, 646 F.3d 1161, 1179 (9th Cir. 2011) (citing *Ohio Forestry Ass'n v.*
4 *Sierra Club*, 523 U.S. 726, 737 (1998)). The affidavits submitted by Plaintiffs
5 demonstrate that individual members have an aesthetic and recreational interest in
6 the Colville National Forest and the viability of certain species, including the gray
7 wolf. *See* ECF No. 29-15 at 8 (Jocelyn Leroux stating that she has "a strong
8 interest in seeing federal lands managed for healthy native ecosystems where apex
9 predators like wolves are allowed to play their natural role."); ECF No. 29-16 at 8
10 (Timothy Coleman stating that "[t]he recovery of wolves, lynx and grizzly bear are
11 important to me from an ecological, ethical, and spiritual standpoint.").

12 The Federal Defendants argue that Plaintiffs fail to show that alleged injuries
13 to those interests through WDFW's lethal wolf removals are "fairly traceable" to
14 the Forest Service's challenged conduct or redressable by future agency action.
15 ECF No. 37 at 24.

16 "Once a plaintiff has established an injury in fact under NEPA causation and
17 redressability requirements are relaxed." *W. Watersheds Project v. Kraayenbrink*,
18 632 F.3d 473, 485 (9th Cir. 2011). "This relaxed redressability standard governs
19 procedural challenges to programmatic actions as well as to specific implementing
20 actions." *WildEarth Guardians*, 795 F.3d at 1156.

1 To establish causation, the injury must be “fairly traceable” to the
2 challenged action of the defendants, and not the result of the independent action of
3 some party not before the court. *Lujan*, 504 U.S. at 560–561. Plaintiff need not
4 show that Defendants’ conduct is “the very last step in the chain of causation.”
5 *City of Seattle v. Monsanto Co.*, 387 F. Supp. 3d 1141, 1154 (W.D. Wash. 2019)
6 (quoting *Ass’n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d
7 939, 953 (9th Cir. 2013)). However, plaintiff must show that there are no
8 independent actions of third parties that break the casual link between the allegedly
9 unlawful act and the alleged harm. *Monsanto Co.*, 387 F. Supp. 3d at 1154.

10 The relaxed redressability requirement for procedural claims is satisfied
11 when “the relief requested—that the agency follow the correct procedures—may
12 influence the agency’s ultimate decision.” *Salmon Spawning & Recovery Alliance*
13 *v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008). However, “the redressability
14 requirement is not toothless in procedural injury cases.” *Id.* “In cases where the
15 alleged injury in fact is caused by a third party, a plaintiff must establish that the
16 hoped-for substantive action on the part of the government could alter the third
17 party’s conduct in a way that redresses the injury in fact.” *Ctr. for Biological*
18 *Diversity v. Export-Import Bank*, 894 F.3d 1005, 1013 (9th Cir. 2018).

19 Here, Plaintiffs assert that their alleged injuries can be redressed by
20 additional NEPA analysis because, following additional environmental review, the
21 agency might choose to adopt wolf-livestock conflict mitigation measures that

1 would reduce such conflicts and thus reduce lethal removals by WDFW. ECF No.
2 29-15 at 11 (“In particular, my harms would be lessened if the Forest Service were
3 required to take concrete measures to prevent conflicts between livestock grazing
4 on public lands and wolves.”); ECF No. 29-16 at 13 (“My injuries would be
5 redressed if the Forest Service adopted adequate measures to protect wolves and
6 other forest carnivores from livestock conflicts”). Such measures include
7 excluding livestock grazing near active core wolf areas i.e., denning and
8 rendezvous sites. ECF No. 44 at 13; *see* AR01981 (“Based on field reports of the
9 13 wolf depredations on livestock since July 8, three were within about a mile of
10 the pack’s activity centers (den or rendezvous sites) and ten ranged from 2 to 10
11 miles away from wolf activity centers); *see also* AR01221 (“WDFW considers
12 wolf radio collar data very sensitive and has expressed concern about
13 dissemination of such information.”).

14 Whereas “[t]he USFWS is the lead management authority over wolves
15 where they remain federally listed in the state,” the WDFW “is the lead agency
16 where wolves are federally delisted” and the “lead agency to respond” to reports of
17 wolf depredations. FP015358, FP015435. The WDFW’s management of gray
18 wolves is guided by the Wolf Recovery Management Plan. *See* FP14359 (the Plan
19 aims to “[m]anage wolf-livestock conflicts in a way that minimizes livestock
20 losses, while at the same time not negatively impacting the recovery or long-term
21 perpetuation of a sustainable wolf population.”); *see also* FP015360 (“The plan

1 outlines a range of management options to address wolf-livestock conflicts. These
2 include both proactive, non-lethal . . . and lethal management options.”). Lethal
3 control is used only as needed after the WDFW makes a case-specific evaluation.
4 FP015435, FP01538.

5 The Court finds that Plaintiffs have failed to show that a favorable ruling
6 will ameliorate the claimed injury where the lethal removal of gray wolves is the
7 prerogative of the WDFW, a third party not before the Court. *See Ctr. for*
8 *Biological Diversity*, 894 F.3d at 1012 (“Where an essential element of standing
9 depends on the reaction of a third party to the requested government action or
10 inaction, ‘it becomes the burden of the plaintiff to adduce facts showing that those
11 choices have been or will be made.’”) (quoting *Lujan*, 504 U.S. at 562).

12 In *Western Watersheds Project v. Grimm*, 921 F.3d 1141 (9th Cir. 2019), the
13 Idaho Department of Fish and Game (“IDFG”) assumed and maintained
14 responsibility for managing gray wolves Idaho upon the gray wolf’s delisting in
15 2011, similar to the WDFW in Washington State. However, in meeting its wolf
16 management objectives, IDFG received substantial assistance from Wildlife
17 Services, a component of the U.S. Department of Agriculture’s Animal and Plant
18 Health Inspection service (“APHIS”). *Id.* at 1145. In fact, Wildlife Services
19 carried out nearly all lethal wolf management in Idaho since 2011. *Id.* at 1148.

20 The Ninth Circuit found Plaintiffs’ injuries were redressable because
21 Plaintiffs had shown that halting Wildlife Services’ wolf-killing activities pending

1 additional NEPA analysis could protect their aesthetic and recreational interests in
2 gray wolves in Idaho. *Id.* at 1147. In so holding, the Court noted that “additional
3 NEPA analysis could change Wildlife Services’ activities in the long term”
4 because “Wildlife Services could decide, in its discretion, to kill fewer wolves or to
5 use only non-lethal means of wolf management moving forward.” *Id.* at 1148.

6 In rejecting Wildlife Services’ argument that, without Wildlife Services’
7 assistance in lethally removing wolves, IDFG could still exercise its independent
8 authority to meet its wolf management objectives, the Ninth Circuit pointed to its
9 decision in *WildEarth Guardians v. U.S. Dep’t of Agric.*, 795 F.3d 1148, 1156 (9th
10 Cir. 2015) (holding that where APHIS and Nevada Department of Wildlife shared
11 responsibility for Nevada’s predator management program, it was possible that,
12 without APHIS, Nevada would spend less on predator management or would
13 implement control methods that were less harmful to the plaintiff’s interests than
14 those used by APHIS).

15 However, neither *Western Watersheds Project v. Grimm* nor *WildEarth*
16 *Guardians v. U.S. Department of Agriculture* are directly on point. As noted by
17 the Federal Defendants, these cases involve the direct involvement of APHIS in the
18 lethal removal of predators. ECF No. 50 at 8. For example, in *Grimm*, it was a
19 matter of speculation as to whether IDFG would implement an identical program
20 without Wildlife Services, thus resulting in the same number of lethal wolf
21 removals. *See Grimm*, 921 F.3d at 1149. Such speculation is absent here.

1 More specifically, the Court need not speculate as to whether the state
2 agency has the requisite expertise and resources to carry out lethal wolf
3 management operations because WDFW is the lead agency. DM03376 (“The
4 WDFW is the primary agency responsible for managing wolves in the Eastern
5 Washington recovery area while WDFW works as an agent of the USFWS in the
6 remaining areas of the state.”); *contra Grimm*, 921 F.3d at 1149.

7 Additionally, the Wolf Conservation and Management Plan provides that
8 lethal removal is conditioned upon non-lethal measures being tried but failing to
9 resolve the conflict. *See* FP015438 (“Lethal removal may be used to stop repeated
10 depredation if it is documented that livestock have clearly been killed by wolves,
11 non-lethal methods have been tried but failed to resolve the conflict, depredations
12 are likely to continue, and there is no evidence of intentional feeding or unnatural
13 attraction of wolves by the livestock owner.”); *see also* DM03391 (“The WDFW
14 and livestock producers can implement non-lethal and preventative control
15 measures any time they deem necessary throughout Washington.”); *see also*
16 AR03179 (moving cattle due to wolf presence). Thus, at least some of the
17 mitigation measures that Plaintiffs seek are already in place and reflected in current
18 removal rates.

19 Accordingly, the Court finds that Plaintiffs have not shown that additional
20 NEPA analysis could protect their aesthetic and recreational interests in gray
21 wolves in the Colville National Forest.

1 **C. Standing to Challenge 2019 Forest Plan Revision & Ripeness of**
2 **NFMA Claims¹**

3 The Federal Defendants also contend that “Plaintiffs have not demonstrated
4 standing to challenge the 2019 Forest Plan revision because the 2019 Plan does not
5 contemplate wolf removal actions or authorize grazing, and the only project-level
6 grazing authorization Plaintiffs challenge is the 2013 Permit, which is governed by
7 the 1988 Forest Plan. ECF No. 37 at 29. Furthermore, the Federal Defendants
8 assert that “Plaintiffs’ facial challenges to the 2019 Forest Plan under NFMA are
9 premature because they can identify no injuries caused by the forest plan or any
10 site-specific injuries due to implementation of the forest plan.” *Id.* at 40.

11 “*Ohio Forestry* held that a generic challenge to a forest plan untethered to
12 any specific or concrete harm was not ripe for adjudication, and therefore not
13 justiciable.” *Wilderness Soc. v. Thomas*, 188 F.3d 1130, 1133 (9th Cir. 1999)
14 (citing *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726 (1998)) (concluding
15 that the plaintiff’s challenge to a resource management plan adopted by the United
16 States Forest Service was not ripe because the plan did not in itself authorize the

17 ¹ “In many cases constitutional ripeness coincides squarely with standing’s injury
18 in fact prong.” *Idaho Rivers United v. United States Army Corps of Engineers*, No.
19 C14-1800JLR, 2016 WL 498911, at *10 (W.D. Wash. Feb. 9, 2016) (citation
20 omitted).

1 agency to enter into logging agreements without a further review process); *see also*
2 *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1136 (9th Cir. 1998)
3 (acknowledging that *Ohio Forestry* “calls into doubt a plaintiff’s ability to
4 challenge an agency’s adoption of a plan without site-specific actions as the focus
5 of the challenge.”).

6 “[T]he ripeness doctrine would not bar a challenge to a forest plan if the
7 plaintiff alleged a specific harm that would flow immediately from adoption of the
8 plan.” *Wilderness Soc.*, 188 F.3d at 1133 (citing *Ohio Forestry*, 523 U.S. at 736–
9 38). Thus, for a challenge to a forest plan to be justiciable under the Act, the
10 plaintiffs must allege either (1) imminent concrete injuries that would be caused by
11 the forest plan or (2) a site-specific injury causally related to an alleged defect in
12 the forest plan. *Id.* at 1133–1134 (holding that a generalized claim that the Forest
13 Service violated NFMA by failing to conduct a forest-wide study on the suitability
14 of grazing was not justiciable, but “because the site-specific injury to the two
15 allotments is alleged to have been caused by a defect in the Forest Plan, we may
16 consider whether the Forest Service complied with the Act in making its general
17 grazing suitability determinations in the Forest Plan.”); *see also Idaho Rivers*
18 *United*, CASE NO. C14-1800JLR, 2016 WL 498911 at *7 (plaintiffs may not
19 “mount a challenge to the [programmatic management plan] without demonstrating
20 ‘any concrete application that threatens imminent harm to [their] interests.’”)
21 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009)).

1 Here, Plaintiffs have not demonstrated cognizable harm which has flowed
2 immediately from the adoption of the revised 2019 Forest Plan. The Forest Plan
3 does not give anyone, including Diamond M, a legal right to graze livestock. *See*
4 *Ohio Forestry*, 523 U.S. at 729 (“Although the Plan sets logging goals, selects the
5 areas of the forest that are suited to timber production . . . and determines which
6 “probable methods of timber harvest are appropriate . . . it does not itself authorize
7 the cutting of any trees.”); *compare* ECF No. 1 at 53 (“The Forest Service violated
8 NFMA’s procedural² requirements by failing to consider during the Forest Plan

9 _____
10 ² Plaintiffs characterize their NFMA claims under 36 C.F.R. § 219.26 and
11 § 219.20 (1982) as “procedural claims” which can be brought as a facial challenge
12 to the Forest Plan. ECF No. 44 at 23. However, the Federal Defendants argue and
13 the Court agrees that Plaintiffs’ NFMA claims “challenge the substance of the
14 Forest Service’s compliance with the grazing suitability and wildlife diversity and
15 viability mandates.” ECF No. 50 at 14 n. 5; *see also Ohio Forestry*, 523 U.S. at
16 737 (distinguishing challenge to forest plan under NFMA from environmental
17 impact statement prepared pursuant to NEPA; “NEPA, unlike the NFMA, simply
18 guarantees a particular procedure, not a particular result.”); *see also Neighbors of*
19 *Cuddy Mountain*, 303 F.3d at 1071 n. 6 (“[W]e emphasize that the Forest Service’s
20 compliance with NEPA’s procedural requirements do not necessarily satisfy its
21 different, more substantive duties under NFMA to ensure species viability

1 revision process . . . which portions of the Colville are suitable for grazing in light
2 of repeated wolf-livestock conflicts or any measures for “regulating” conflicts
3 between livestock and wolves. 36 C.F.R. § 219.20 (1982).”) *with Wilderness Soc.*,
4 188 F.3d at 1133–34 (finding claim alleging “that the Forest Service violated the
5 NFMA by adopting the Plan before conducting a grazing suitability determination”
6 was not justiciable).

7 No grazing will take place under the 2019 Forest Plan until the Forest
8 Service engages in project-level NEPA analysis. *See Ohio Forestry*, 523 U.S. at
9 735 (“[T]he possibility that further consideration will actually occur before the
10 Plan is implemented is not theoretical, but real.”); *see also W. Watersheds Project*
11 *v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (“BLM’s decision to exclude broad
12 changes to its grazing management throughout the Monument in the Breaks
13 Resource Plan does not avoid its critical obligation to consider changes to grazing
14 preferences at the site-specific stage.”); *see also* FP108235 (“[L]ivestock grazing is
15 a suitable use of NFS lands and level of grazing is determined for each allotment

16 _____
17 throughout the forest.”); *Or. Nat. Des. Assoc. v. United States Forest Serv.*, 957
18 F.3d 1024, 1035 (9th Cir. 2020) (“We recognize the Forest Service’s substantive
19 obligations to ensure that “[s]ite-specific projects and activities . . . be consistent
20 with the approved forest plan[.]”).

1 under project-level NEPA analysis. Determinations about the type and amount of
2 grazing, seasonal restrictions, and site-specific direction are determined during that
3 project-level analysis.”).

4 For a site-specific injury causally related to alleged defects in the forest plan,
5 Plaintiffs point to “annual authorizations through which the USFS authorizes
6 grazing on the Diamond M allotments, a site-specific action that should implement
7 the revised Forest Plan.” ECF No. 44 at 11. The Forest Service maintains that it
8 does not issue AOIs, but rather, merely issues “Grazing Management Strategy
9 Notes.” ECF No. 37 at 54; *see ONDA*, 465 F.3d at 983 (holding that AOI is an
10 agency action under the APA where AOI was incorporated and “made part of Part
11 3 of [the] Term Grazing Permit” by reference in the AOI); *see also W. Watersheds*
12 *Project v. Bureau of Land Mgmt.*, 971 F.Supp.2d 957, 977 (E.D. Cal. 2013) (“But
13 because the permit had already been issued, the federal action was complete and
14 there was no ongoing major federal action mandating NEPA review.”).

15 Assuming *arguendo* that the Forest Service’s “Grazing Management
16 Strategy Notes” for the 2020 grazing season gives rise to site-specific injury, it is
17 not causally related to alleged defects in the revised 2019 Forest Plan. Rather, any
18 such action would have been authorized under the 2013 Permit issued, which
19 remains in effect until 2022, under the 1988 Forest Plan, which Plaintiffs have not
20 challenged. ECF No. 37 at 53; 36 C.F.R. § 219.15 (“Every decision document
21 approving a plan, plan amendment, or plan revision must state whether

1 authorizations of occupancy and use made before the decision document may
2 proceed unchanged.”); *see* FP113667 (“Previously approved and ongoing projects
3 and activities are not required to meet the direction of the revised land management
4 plan and will remain consistent with the direction in the 1988 plan, as amended
5 (USDA Forest Service 1986).”); FP113668 (“Authorizations for occupancy and
6 use made before this plan approval may proceed unchanged until time of
7 reauthorization.”).

8 Thus, Plaintiffs have neither demonstrated that they will suffer imminent
9 concrete injuries that would be caused by the 2019 Forest Plan nor a site-specific
10 injury causally related to an alleged defect in the 2019 Forest Plan. Accordingly,
11 Plaintiffs’ NFMA claims challenging the 2019 Forest Plan are not justiciable. *See*
12 *Ohio Forestry*, 523 U.S. at 734 (“Any such later challenge might also include a
13 challenge to the lawfulness of the present Plan if (but only if) the present Plan then
14 matters, i.e., the Plan plays a causal role with respect to the future, then-imminent,
15 harm from logging.”).

16 Having found that Plaintiffs do not have standing for their NEPA and
17 NFMA claims, the Court does not reach the merits of those claims nor does it
18 reach the merits of Plaintiffs’ Motion to Consider Extra-Record Evidence, ECF
19 Nos. 30, 34, filed in support of their supplemental NEPA claim.

20 II. ESA Claim—Failure to Consult with USFWS

1 Plaintiffs assert that “[t]he USFS violated Section 7(a)(2) of the ESA by
2 failing to consult with USFWS over the potential effects of Diamond M’s cattle
3 grazing on the C.C. Mountain, Copper-Mires, and Lambert allotments to ESA-
4 listed species.” ECF No. 29 at 53 (citing 16 U.S.C. § 1536(a)(2) (“Each Federal
5 agency shall . . . insure that any action authorized, funded, or carried out by such
6 agency . . . is not likely to jeopardize the continued existence of any endangered
7 species or threatened species or result in the destruction or adverse modification of
8 habitat of such species which is determined by the Secretary, after consultation as
9 appropriate with affected States, to be critical”); *see also* ECF No. 1 at 56
10 (“At least since 2000, the Forest Service has failed to prepare a Biological
11 Assessment to determine whether annual grazing on the Copper-Mires,
12 Lambert, and C.C. Mountain allotments “may affect” listed, proposed and/or
13 candidate species such as Canada lynx, grizzly bear and whitebark pine that may
14 be present in the action area.”).

15 Section 7 of the ESA requires an agency to ensure that no discretionary
16 action will “jeopardize the continued existence of any endangered species or
17 threatened species or result in the destruction or adverse modification of [critical]
18 habitat of such species.” 50 C.F.R. § 402.12(a); *see* 16 U.S.C. § 1536(a)(2). The
19 first step in complying with ESA-mandated inter-agency consultation procedures is
20 to obtain from the appropriate federal wildlife service “a list of any listed or
21 proposed species or designated or proposed critical habitat that may be present in

1 the action area.” 16 U.S.C. § 1536(c)(1). If the wildlife service advises that a listed
2 species may be present in the affected area, the agency must complete a biological
3 assessment (BA) in accordance with NEPA “for the purpose of identifying any
4 endangered species or threatened species which is likely to be affected by such
5 action.” *Id.* If the biological assessment concludes that listed species are in fact
6 likely to be adversely affected, the agency ordinarily must enter “formal
7 consultation” with the wildlife service. 16 U.S.C. § 1536(a)(2); *see* DM02303
8 (Biological Evaluation for the Big Border Cluster Grazing Allotments, Grazing
9 Permit Reissuance Analysis dated August 11, 2006).

10 There is no dispute that the Forest Service fulfilled its ESA Section 7
11 obligations on a “programmatic level” in its Biological Assessment and with its
12 formal consultation with the USFWS on the 2019 Plan. ECF Nos. 44 at 29–30, 50
13 at 21. However, Plaintiffs contend that the Forest Service failed to consult over the
14 site-specific impacts of Diamond M’s grazing on the Lambert, Copper-Mires, and
15 C.C. Mountain allotments on the whitebark pine, Canada lynx, and grizzly bear.

16 The Court addresses each species in turn.

17 **1. Whitebark Pine**

18 The Federal Defendants argue that it had no Section 7 consultation
19 requirement with respect to the whitebark pine because it was not listed as an ESA-
20 protected species. ECF No. 37 at 57; ECF No. 1 at 26 (Plaintiffs’ Complaint
21 identifying the whitebark pink as a candidate for federal listing); *see* 50 C.F.R. §

1 402.12(d) (candidate species have no legal status and are accorded no protection
2 under the Act). Plaintiffs' response and reply is silent on this issue. *See* ECF No.
3 44 at 35–36.

4 The Court concurs with the Federal Defendants that because the whitebark
5 pine was neither listed nor proposed to be listed, but was rather a candidate
6 species, the Forest Service had no duty to consult or confer under the ESA until
7 December 2020.

8 **2. Canada Lynx**

9 With respect to the lynx, the Federal Defendants assert that the Forest
10 Service consulted with USFWS under ESA Section 7 in March 2000 and again in
11 2017 in connection with the BA and Biological Opinion for the 2019 Forest Plan.
12 ECF No. 37 at 58; *see* FP005512–15 (BA for Colville National Forest, Forest-wide
13 Existing and Ongoing Projects in Potential Lynx Habitat dated March 1, 2000,
14 concluding that livestock grazing “may affect but is not likely to adversely affect”
15 lynx or lynx habitat). Plaintiffs argue that the programmatic BA is insufficient.
16 ECF No. 44 at 36; *see also* FP098496 (“[A]ny future land management activities
17 that occur through implementing the plan will be subject to ESA section 7(a)(2)
18 consultation.”).

19 Plaintiffs cite to *Native Ecosystems Council v. Marten*, No. CV 18-87-M-
20 DLC, 2020 WL 1479059, at *9 (D. Mont. Mar. 26, 2020) for support. ECF No. 44
21 at 36. In *Marten*, the programmatic BA was a 12-page document for 11 national

1 forests across four states. *Marten*, No. CV 18-87-M-DLC, 2020 WL 1479059, at
2 *9. The BA concluded that general forest treatment activities were not a threat to
3 wolverine’s survival but disclaimed that “some activities listed in the proposed
4 action . . . have the potential to affect individual wolverines and/or their habitat,
5 but not to the level of jeopardizing the continued existence of the wolverine.” *Id.*
6 The court concluded that “[t]he programmatic BA is insufficient to meet the Forest
7 Service’s obligation to address the ‘direct and indirect effects of an action on the
8 species together with the effects of other activities that are interrelated or
9 interdependent with that action,’ 50 C.F.R. § 402.02, because it is too general.” *Id.*

10 As noted by the Federal Defendants, whereas the programmatic BA in
11 *Marten* was exceedingly brief, comprised of only 12 pages, and broader in scope,
12 encompassing 11 national forests across four states, the BA for the 2019 Forest
13 Plan is a comprehensive 263-page document focusing on one national forest in one
14 state. ECF No. 50 at 22; *see* FP098766–099033 (Biological Assessment);
15 FP100804–100806 (USFWS Biological Opinion outlining actions implemented
16 under the Forest Plan that may result in positive and negative effects to lynx
17 habitat including livestock grazing). Given these factual differences with respect
18 to the thoroughness and scope of analysis, the Court finds Plaintiffs’ reliance on
19 *Marten* is misplaced.

20 For the Canada lynx, USFWS determined that the revised 2019 Forest Plan
21 was not likely to jeopardize the lynx’s continued existence. *See* FP100807

1 (USFWS concluding that the Forest Plan, encompassing the allotments, is not
2 likely to jeopardize the continued existence of the lynx).

3 This determination was subsequent to informal consultation with USFWS in
4 2000 where the USFWS concluded that the ongoing projects and activities on the
5 Forest, including livestock management and cattle grazing, “may affect, but are not
6 likely to adversely affect” the lynx. FP005506–005509 (“This project should be
7 re-analyzed if new information reveals that effects of the action may affect listed
8 species or critical habitat in a manner, or to an extent, not considered in this
9 consultation; if the action is subsequently modified in a manner that causes an
10 effect to the listed species or critical habitat that was not considered in this
11 consultation; and/or if a new species is listed or critical habitat is designated that
12 may be affected by this project.”).

13 In light of these consultation efforts, the Court finds that the Forest Service
14 appropriately consulted with USFWS over grazing impacts to lynx on the
15 allotments.

16 **3. Grizzly Bear**

17 The Federal Defendants argue that the Forest Service had no duty to consult
18 with USFWS because grizzly bears have not been detected in that area for nearly
19 two decades. ECF No. 37 at 59–60; *see also All. for the Wild Rockies v. Krueger*,
20 664 Fed. App’x 674, 676–678 (9th Cir. 2016) (holding that Forest Service’s
21 determination that the grizzly bear is not a species that “may be present” in the

1 project area given only unverified grizzly sightings was not arbitrary and
2 capricious); *see also Native Ecosystems Council v. Krueger*, 946 F. Supp. 2d 1060,
3 1074 (D. Mont. 2013) (“The question of whether lynx ‘may be present’ in an area
4 is less rigorous than the question of whether lynx ‘occupy’ an area.”).

5 Plaintiffs assert that the Forest Service was required to confer over potential
6 grizzly bear presence on the allotments given that “bears occupy the Forest’s
7 eastern half, have been documented within its western half, and the Kettle River
8 Range provides high quality habitat complete with whitebark pine—a primary food
9 source for grizzlies.” ECF No. 44 at 36.

10 The Court finds that the Forest Service had no obligation to consult with the
11 USFWS over site-specific impacts of grazing to grizzlies because the Forest
12 Service’s determination was reasonable that the presence of grizzlies is limited to
13 areas outside the allotments, based upon the Forest Service’s historical record and
14 scientific data. *See Alliance for the Wild Rockies v. Bradford*, 864 F. Supp. 2d
15 1011, 1020 (D. Mont. 2012) (“There is significant evidence in the record to
16 support the Forest Service’s conclusion that grizzlies are no longer present in the
17 Project area—there had not been a credible grizzly sighting or evidence of grizzly
18 habitation in the area since 1995”); *see* AR01816 (2020 Forest Service map
19 showing no grizzly observations from 2000 to 2019 on or near the allotments);
20 FP095165 (“The LeClerk Creek Grazing Allotment is the only active grazing
21

1 allotment within the [Colville National Forest] portion of the Selkirk Grizzly Bear
2 Recovery Zone.”).

3 For the reasons stated above, the Court finds that the Forest Service
4 consulted with the USFWS when appropriate and thus judgment should be entered
5 in favor of the Federal Defendants for Plaintiffs’ claim under the ESA.

6 Accordingly, **IT IS HEREBY ORDERED:**

7 1. Plaintiffs’ Motions to Consider Extra-Record Evidence in Support of
8 Plaintiffs’ Motion for Summary Judgment, **ECF Nos. 30, 34**, are **DENIED AS**
9 **MOOT**.

10 2. Plaintiffs’ Motion to Strike Federal Defendants’ and Defendant
11 Intervenors’ Extra-Record Declarations and Exhibits, **ECF No. 46**, is **GRANTED**.

12 3. Plaintiffs’ Motion for Summary Judgment, **ECF No. 29**, is **DENIED**.

13 4. The Federal Defendants’ Cross-Motion for Summary Judgment, **ECF**
14 **No. 37**, is **GRANTED**. Plaintiffs’ NEPA and NFMA claims are **DISMISSED**
15 **WITHOUT PREJUDICE** and Plaintiffs’ ESA claim is **DISMISSED WITH**
16 **PREJUDICE**.

17 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
18 Order, enter judgment for the Federal Defendants, provide copies to counsel, and
19 **close the case**.

20 **DATED** September 10, 2021. s/ Rosanna Malouf Peterson
21 ROSANNA MALOUF PETERSON
United States District Judge

ORDER DENYING PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT
AND GRANTING FEDERAL DEFENDANTS’ MOTION FOR SUMMARY
JUDGMENT ~ 36